NAMB
National Association of Mortgage Brokers

June 27, 2005

<u>VIA Electronic Submission</u>

Federal Trade Commission
Office of the Secretary
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Sir or Madam:

The National Association of Mortgage Brokers ("NAMB") appreciates the opportunity to comment on the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking ("NPRM"), published in the *Federal Register* May 12, 2005, regarding provisions of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or the "Act").

We applaud the FTC's efforts to curb the growing volume of unsolicited commercial electronic mail ("Spam") and protect consumers from the time-consuming and costly issues associated with Spam. However, we have significant concerns that certain proposed provisions impose undue administrative and compliance burdens on small businesses striving to comply with the Act. Before discussing these concerns, we provide general information about mortgage brokers and NAMB.

<u>Overview of the mortgage brokerage industry and NAMB</u>

NAMB is the only national trade association exclusively devoted to representing the mortgage brokerage industry. As the voice of mortgage brokers, NAMB speaks on behalf of more than 26,000 members in all 50 states and the District of Columbia. NAMB offers educational courses and certification programs to mortgage professionals to maintain their expertise. By adhering to a strict code of ethics and best lending practices, NAMB members guide consumers effortlessly through the mortgage loan origination process.

As way of background, mortgage brokers act as intermediaries between consumers and lenders when the borrower finances the purchase of a home or refinances an existing mortgage. A typical broker maintains business relationships with various lenders to provide consumers with numerous financing options. These partnerships allows the

52,000 mortgage brokerage companies employing over 452,000 employees in the United States to offer consumers the most competitive mortgage products available.

By offering consumers a variety of products, mortgage brokers can find loans for borrowers that match the financial needs of each customer. Mortgage brokers assist buyers with excellent credit histories in addition to those with less than perfect credit histories. The mortgage brokerage industry also helps borrowers with low-to-moderate incomes in finding access to the credit they need to secure the benefits of homeownership. By advising homebuyers throughout the home financing process and delivering cost effective mortgages to consumers, mortgage brokers originate two out of every three residential loans in any given year. As the single largest group of loan originators, mortgage brokers undoubtedly have played a significant role in increasing the rate of homeownership in the United States to an all-time high of almost 70 percent.

CAN-SPAM Act

The CAN-SPAM Act outlines requirements concerning the use of commercial electronic mail ("email"), grants federal civil and criminal enforcement authorities the tools to combat Spam, and gives states the authority to impose its civil provisions. The Act also creates a private right of action for Internet access services providers and affords consumers the ability to protect their privacy interests by opting out from commercial email.

The scope of the CAN-SPAM Act requirements covers all commercial email, whether solicited or unsolicited, and whether broadcast or sent as a single email, that is primarily designed to sell something, unless the email falls into the definition of "transactional or relationship" message.[1] Specifically, the CAN-SPAM Act imposes three requirements on commercial email: (1) that the email is not deceptive, (2) that senders of commercial email give and honor an opt-out request, and (3) that the email provides clear and conspicuous disclosure of any advertisement, and include a valid physical postal address.

NAMB's comments focus primarily on the FTC's proposed modification of the 10 business day opt-out period and the proposed provision regarding clarification of information deemed necessary to complete an opt-out request. However, NAMB also takes this opportunity to reiterate its comments on the definition and scope of "transactional or relationship" message.

NAMB's Concerns

Modification of Opt-Out Timeframe

The CAN-SPAM Act prohibits senders, or persons acting on their behalf, from sending any commercial email to a recipient that has requested to opt-out. The Act currently mandates that senders of commercial email process any opt-out request within 10 business days. The NPRM states that the FTC, however, has the authority to modify this

[1] CAN-SPAM Act, 15 U.S.C. 7702(2)(A), (17)(A).

10 business day opt-out period if "it determines that a different time frame would be more appropriate after taking into account the purposes of section 7704(a); the interests of recipients of commercial electronic mail; and the burdens imposed on senders of lawful commercial electronic mail." *Federal Register*, Part II.B., p. 25442.

The FTC proposes to modify the 10 business days currently allotted to process the opt-out request of a recipient of commercial email to just 3 business days, pursuant to its authority under Section 7704(c)(1) of the Act. The NPRM cites the availability of current technology that allows for expeditious processing of opt-out requests as support for shortening the time frame from 10 to 3 business days. *Federal Register*, Part II.B.2, p. 25444.

This shortened timeframe imposes undue administrative and cost burdens on small businesses striving to comply with the Act. Many mortgage brokers, as small businesses,[2] are outfitted with limited staff and resources and do not have the means to effectuate an opt-out request within 3 business days. Although advanced technology exists that enables certain senders to process opt-out requests within this abbreviated timeframe, many brokers do not have the necessary resources to invest in such technology. Rather, mortgage brokers often manage their email campaigns in-house through software such as Microsoft Outlook® rather than outsourcing or investing in specialized and costly software. These small business entities simply do not have the resources necessary to track and differentiate opt-out requests, unsubscribes or bounced emails, and then process opt-out requests within 3 business days, because all the emails are handled by one mailbox.

As a result, mortgage brokers who are unable to afford the technology required to comply with the proposed opt-out timeframe will be forced either to (1) no longer use email as a means of communications with their customers, or (2) expend capital to invest in the requisite technology. Either choice leads to a significant increase in costs and will hamper effective and efficient communication between brokers and their consumers. Because many mortgage brokers rely heavily on the internet and use of email as a cost-effective means to market to and communicate with consumers, the loss of this cost-efficient method of communication is detrimental to the mortgage brokerage industry. In short, NAMB believes that the current proposed opt-out timeframe of 3 business days will do nothing more than impose an undue administrative burden on small businesses that will result in a significant increase in costs to users of commercial email without providing the corresponding benefit to consumers. NAMB suggests the FTC adopt a more reasonable 30 day time period to process these opt-out requests.

In addition, for the above stated reasons, NAMB believes it is imperative that the FTC conduct a revised initial regulatory flexibility analysis ("IRFA") in accordance with the Regulatory Flexibility Act.[3] NAMB believes that the IRFA accompanying this NPRM is fundamentally flawed in its conclusion that the substantive compliance obligations

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[2] The Small Business Administration defines "small businesses" for loan brokers as being those with $5mm in annual receipts. Under this definition, the majority of mortgage brokers are small businesses.
[3] 5 U.S.C. § 601-612.

originating from the shortened opt-out timeframe are not likely to impose a substantial impact on significant numbers of small entities. *Federal Register*, Part VI.D, p. 25448. Rather, NAMB believes that the proposed 3-business day time period has a disproportionate economic impact on all small business entities, which includes many mortgage brokers. Further analysis is necessary to ensure that the numbers professed in the IRFA bear out the impact this proposed provision will have in the marketplace. Specifically, NAMB respectfully requests that the revised IRFA take into consideration the cumulative comments of small business entities subject to this proposed revision, identify and quantify the costs small businesses will incur by complying with the proposed revision, and develop less costly alternatives that achieve the FTC's objective of ensuring that recipients have a viable opt-out request while minimizing the impact on small businesses.

Restriction on Information Required to Process Opt-Out Request

The FTC also proposes a provision that will broadly prohibit any sender, or any person acting on behalf of any sender, from charging a fee or requiring any personally identifying information beyond one's email address to effectuate an opt-out request.[4] NAMB acknowledges that this proposed provision is an effort by the FTC to rein in those senders of commercial email who attempt to impede a recipient's right to opt-out. However, the breadth of this provision presents several problems relating to privacy interests and effectuating the opt-out request in a timely manner.

For example, a sender may require a recipient to visit a home website and then log-in to access another website that would allow the recipient to request an opt-out. The log-in feature is used to preserve and protect the recipient's identity and to ensure he or she is indeed authorized to request an opt-out. The proposed provision effectively prevents senders from confirming the identity of the recipient. Further clarification on whether this log-in feature would violate the proposed rule of visiting only one website is necessary. Another example involves a tax-exempt, not-for-profit trade association that requests a member's identification number ("ID") in addition to the email address to process the opt-out request appropriately. Further clarification is needed on whether the request for the ID would constitute a violation of the proposed rule that no other personally identifiable information be requested. There are also technical issues raised by the proposed rule. It is unclear how a sender would adequately process an opt-out request for a recipient who previously gave the sender a different email address to keep on file. To process the opt-out request, the sender may need additional information from the recipient and it is unclear whether this request would violate the proposed rule.

Significantly, the inability to request the information needed to process an opt-out request further exacerbates the problems raised by the short opt-out period of 3 business days.

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[4] Proposed § 316.5 states that "Neither a sender nor any person acting on behalf of a sender may require that any recipient pay any fee, provide any information other than the recipient's electronic mail address and opt-out preferences, or take any other steps except sending a reply electronic mail message or visiting a single Internet Web page, in order to" request an opt out and have such request honored. *Federal Register*, § 316.5, p. 25453.

Together, these two provisions impose an undue and costly administrative burden on small business entities. Again, NAMB respectfully requests that the FTC issue a revised IRFA that examines the impact this provision, in conjunction with the 3 business day opt-out period, has on small business entities.

Definition of "Transactional or Relationship" Message

CAN-SPAM excludes from its definition of commercial email any message that has as its primary purpose a transactional or relationship function.[5] "Transactional or relationship" messages can not be deceptive, but are otherwise exempt from the CAN-SPAM requirements. The FTC also has designated five categories of "transactional or relationship" messages.[6] Although the FTC has not proposed in this NPRM any modification to the definition of "transactional or relationship" message, NAMB would like to take this opportunity to reiterate its comments on expansion and clarification of the term.

Again, NAMB urges the FTC to expand the definition of "transactional or relationship" messages so that business entities operating in the mortgage industry are able to effectuate consumers' requests and needs in a timely manner. Throughout the home mortgage buying process, consumers request or desire information that will allow them to finance a home. Much of the information sought by consumers is needed during the comparison shopping phase *before* any business relationship is established. To ensure a level playing field, small business entities should be able to use the cost-effective method of emails to reach out to this consumer base. In addition, the term "transactional or relationship" message should be broadened to encompass pre-existing business relationships. Excluding pre-existing business relationships from the Act enables mortgage brokers to communicate information regarding products and services that its former clients may find valuable. In sum, construing the definition of "transactional or relationship" message narrowly can interfere with the ability of mortgage brokers, as legitimate small businesses, to deliver products and services electronically to their current and past customers in a timely and cost-effective manner.

NAMB greatly appreciates your consideration of our comments. If you have any questions, please contact Roy DeLoach at 703-245-8035 or Nikita Pastor at 703-610-0205.

Sincerely,

/s/ Jim Nabors

Jim Nabors
President

[5] CAN-SPAM Act, 15 U.S.C. 7704(d)(4).
[6] CAN-SPAM Act, 15 U.S.C. 7702(17).